was also the contractor for the construction of the Subang Golf Club. It is therefore highly probable that NKHC had used substantial portion of the steel supplied for its other projects and, as such, the Government should not be liable for the value of all the steel as disclosed in Exhibit C. In my view, the invoices in Exhibit C merely show the amount of steel bought by NKHC, but they do not prove how much of the steel bought were actually delivered at the work-site for the use of the Radio House project. With regard to the P.W.D. Chartered Quantity Surveyor, who is a witness called by the plaintiff, his evidence does not support the figure claimed by Malayawata. In his testimony, he states that certain dimension of steel bars found on the site were not required for the Radio House project, and those that were required some did not come from Malayawata since Malayawata only produced certain dimensions of steel at that time. He also states that when the contract with NKHC was terminated and a new contract was awarded to Syarikat Pembenaan Raya Sendirian Berhad to complete the project on November 27, 1969, the total amount of steel found on site and incorporated was only 1,366.98 long tons, that is to say, less by 62.959 long tons than the figure claimed by Malayawata. Out of 1,366.98 long tons of steel incorporated and unincorporated, not all the steel could have come from Malayawata. Based on the sizes of steel bars, PW2 says under cross-examination, only 866 long tons could have come from Malayawata. In short, instead of 1,429.939 tons worth of steel, the Government merely received 866 tons. There is, therefore, a shortage of 563 tons. Even accepting the price of the steel at a flat rate of $370 per long ton irrespective of its different sizes, the value of 866 long tons of steel would come to $320,420. Since Malayawata have been paid a total sum of $311,372, it seems to me that at the most, only a sum of $9,045 and not $215,618.64 is due from the Government to Malayawata, even if the equitable assignment is enforceable. To complicate matters, there is the evidence of the site diary which contains a different set of figures regarding steel supplied on site.

From the above conflicting evidence adduced on behalf of the plaintiffs, it is clear that the total quantity of steel supplied by Malayawata for the construction of the Radio House at Bukit Putri cannot be properly ascertained. It is not the duty of the court to speculate on the actual worth of steel supplied by Malayawata and received by the Government. In the event, I hold that Malayawata have failed to prove what is the actual quantity of steel supplied and its value. In my considered opinion, even if Malayawata had been successful in proving that the equitable assignment is enforceable in that it is not conditional, or not non-absolute, or not severable, the present claim would still fail in view of the unsatisfactory evidence as to the amount of steel supplied and its value.

For the above reasons, I dismiss the plaintiffs' claim with costs.

Claim dismissed.

Solicitors: *Allen & Gledhill.*

TAN TOI LAN v. LAI KEE YING

[O.C.J. (Wan Suleiman F.J.) July 18, 1974]
[Seremban — Civil Suit No. 13 of 1972]

Workmen's Compensation — Claim referred to arbitrator — Arbitrator dismissing claim but without deciding questions referred to him — Appeal — Application for certificate not made within reasonable time — Whether plaintiff estopped from making the claim — Workmen's Compensation Ordinance, 1952, ss. 39(2) and 41(1)(a).

Arbitration — Award — Uncertain — Effect of.

The plaintiff had made a claim for workmen's compensation arising from the death of her husband whilst he was in the employment of the defendant. The claim was referred to the arbitrator and the questions referred were as follows:—

(a) whether deceased was a workman as defined in the Ordinance;

(b) whether the accident arose out of or was in the course of employment;

(c) whether the amount of compensation claimed for or any portion thereof was payable;

(d) whether the respondent was liable to pay such compensation as is ordered.

After a hearing the learned arbitrator dismissed the claim.

The plaintiff did not obtain a certificate from a judge of the High Court under section 39(2) of the Workmen's Compensation Ordinance but brought an action for damages. Subsequently the plaintiff applied for an extension of time to file an application for a certificate under section 39(2) and for the issue of such a certificate.

Held: (1) the order in this case was one where it was uncertain how it has decided the matters referred to the arbitrator and had the appeal been brought in time, there could be no doubt that it would have been set aside for uncertainty;

(2) no sufficient reason had been advanced for the inordinate delay in marking the application for a certificate and therefore the application for extension of time would be dismissed;

(3) the award in this case should not because of its uncertain nature estop the plaintiff from claiming that the defendant was the employer of her deceased husband and she is therefore not debarred from maintaining the suit under section 41(1)(a) of the Workmen's Compensation Ordinance.

Case referred to:-

(1) *Tan Kooi Neoh* v. *Chuah Tye Imm* [1958] M.L.J. 123.

CIVIL SUIT.

Atma Singh Gill for the plaintiff.

Leow Shin Fong for the respondent.

Wan Suleiman F.J.: This is an application by the defendant in Civil Suit No. 13 of 1972 under Order 25 r. 2, on a preliminary issue of law raised in paragraph 7 of the statement of defence.

The action abovementioned was brought by one Tan Toi Lan, the widow of one Ah Kaw @ Lew Kwae (deceased) on her own behalf as well as those of 7 other dependants against the applicant/defendant for damages for loss of support.

In her statement of claim the widow alleged that her deceased husband had died whilst he was in the employment of the defendant on 21st May 1970 whilst felling rubber trees at Tampin Linggi Estate, when a tree fell and hit the deceased.

After the death of her husband, the widow claimed Workmen's Compensation from Tampin Linggi Estate under section 27 of the Workmen's Compensation Ordinance, 1952, and since no agreement was reached, the question was referred to the President, Sessions

Court Seremban, as arbitrator under section 30 of the Workmen's Compensation Ordinance, 1950 (Sessions Court Seremban Misc. Application No. 2/71).

The arbitrator held an enquiry under section 34 of the Ordinance, and dismissed the claim for compensation, which was apparently brought against the said estate as "the principal" under section 19 of the Ordinance.

It was argued for the applicant/defendant that in dismissing the claim brought by the plaintiff under section 19 the arbitrator had impliedly found that deceased was not an employee of the defendant.

The four questions which had been referred to the arbitrator for determination in Sessions Court Seremban Misc. Application No. 2/71 (translated from the original bahasa Malaysia) are as follows:

(a) whether deceased was a workman as defined in the Ordinance;

(b) whether the accident arose out of or was in the course of employment;

(c) whether the amount of compensation claimed for or any portion thereof was payable;

(d) whether the respondent was liable to pay such compensation as is ordered.

The learned arbitrator, after hearing the evidence of a brother of the deceased, who claimed that the deceased was working for the applicant/defendant, who had a contract to fell trees for the Tampin Linggi Estate, the plaintiff who said that deceased had told her that he was working for the defendant shortly before his death, and the defendant who denied that deceased had been employed by him, merely recorded an order which reads as follows: "I dismiss the claim"

It is clear that under section 39 of the Ordinance there cannot be an appeal from an arbitrator's finding of fact. (See *Tan Kooi Neoh* v. *Chuah Tye Imm*[1]). The plaintiff can only attack the award or order of the arbitrator by obtaining a certificate from a judge of the High Court, under section 39(2), which certifies "that the decision of the arbitrator involves a question of law which is desirable in the public interest to have determined by the High Court".

This the respondent/plaintiff sought to do. By consent of the parties, further proceedings under this summons in chambers was stayed and respondent filed an Originating Motion No. 13 of 1974 praying for what in effect was extension of time to file an application out of time for a certificate under section 39(2) of the Ordinance, and for the issue of such a certificate.

An application for a certificate under section 39(2) should be made within a reasonable time and not, as suggested by Mr. Atma Singh Gill within the period limited for appeals by a lower court, within 14 days of the arbitrator's decision i.e. in this instance by 11 June 1971, since no time limit is specified under that sub-section. In this conclusion I am fortified by the unreported decision of Abdul Hamid J. in High Court Kuala Lumpur Originating Summons No. 66 of 1972.

In the latter originating summons the application was made 19 days after the arbitrator's decision, and the learned judge held that it had been made within a reasonable time. In the present instance, even had the application been made on the date on which the summons in chambers was first heard, it cannot be fairly said to have been made within a reasonable time. No sufficient reason was advanced for the inordinate delay in making the application and I therefore dismissed the application made in Originating Motion No. 13 of 1974 (with costs).

However a point of law of great interest was raised by Mr. Leow in the course of arguments in support of that motion viz. the arbitrator had not answered the four questions referred to him for arbitration.

On carefully considering the submission of counsel as recorded by the learned arbitrator there can be no doubt that they, at least had the relevant issues as set out in the four questions posed, clearly in mind. But try as I may, I am unable to bring myself to stretch the order of the arbitrator so as to provide an answer even to the basic questions i.e. whether the deceased was an employee or workman of the defendant, and if he was, whether the claim fell within section 19 of the Ordinance. I can see no way by means of which I can stretch this bare order so as to make it answer all four questions.

It is therefore the sort of order or award of which one can say it was uncertain how it has decided the matters referred to the arbitrator.

What then is the effect of an uncertain award? A passage in *Russell* on Arbitration, 18th Edn. at page 281 appears to provide the answer. It reads as follows:

> "An award ought to be certain, so that no reasonable doubt can arise upon the face of it as to the arbitrator's meaning, or as to the nature and extent of the duties imposed by it on the parties. If the arbitrator directs one party to pay money, or to execute a release to the other, the award is sufficiently certain, though it mentions no time; for if a request to do the act is necessary, it must be done in a convenient time after the request; if no request is necessary, it must be performed in a reasonable time.
>
> If it is doubtful whether the award has decided the question referred it will be set aside for uncertainty.
>
> The award will be equally invalid if it is uncertain how it has decided the matters referred."

Had an appeal been brought within time, there can be no doubt that it would have been set aside for uncertainty.

The net result of this uncertainty is that it can be said that the arbitrator, in choosing to dismiss the claim, had at best only answered question (c) i.e. whether the compensation claimed was payable. In the absence of answers to questions (a), (b) and (d) the arbitrator's dismissal of the claim, could be for at least one of the following reasons:

(a) that deceased was not a workman as defined in the Ordinance i.e. was not under a contract of service with defendant in this civil suit OR

(b) that the accident which caused the death had not arisen out of or in the course of deceased's employment OR

(c) that the respondent in the arbitration proceedings, the Ladang Tampin Linggi was not the principal

within the meaning of section 19 and therefore was not liable to pay compensation.

It cannot therefore be said that the effect of the order of the arbitrator is that the arbitrator had thereby decided that the defendant in this civil suit was not the deceased's employer.

Since the present action against the defendant who deceased claimed was his employer, the fact that the arbitrator's award still stands, should not, because of its uncertain nature, estop the plaintiff, deceased's widow from making such an assertion. I would therefore, with respect disagree with Mr. Atma Singh Gill's contention that she should be debarred from maintaining this suit under section 41(1)(a) of the Ordinance.

Despite the urgings of learned counsel for the applicant in his written submission, I think it premature to make any ruling on plaintiff's alternative prayer contained in paragraph 11 of her statement of claim, or comment on what the trial court should do, should the contingency under section 42(2) of this Ordinance arise.

The application is dismissed with costs.

Application dismissed.

Solicitors: *Atma Singh Gill & Gill; Shearn, Delamore & Co.*

CH'NG YAT HUAT v. LEE CHU PEE & ANOR.

[O.C.J. (Syed Othman J.) August 17, 1974]
[Johore Bahru — Summons in Chambers Entered No. 267 of 1974 (Civil Suit No. 325 of 1972)]

Practice and Procedure — Judgment debt — Order for payment by instalments — Default — Whether judgment creditor entitled to issue writ of seizure and sale — R.S.C., 1957, O. 47, r. 17(a).

The plaintiffs had obtained a consent judgment against the defendants and it was ordered that the judgment debt should be paid by instalments and that in the event of default of payment of any instalment the whole of the balance unpaid shall become due and payable. The defendants did not pay the instalments due and the plaintiff caused a writ of seizure and sale to be issued. The first defendant sought to have the seizure set aside on the ground that it was wrongful or irregular.

Held: the failure by the defendants to pay any instalment by the date ordered makes the whole balance due and payable and the effect is that the order to pay by instalments is vacated and the judgment creditor is entitled to issue forthwith a writ of seizure and sale, unless the whole balance is paid.

Cases referred to:-

(1) *G. Stephen* v. *Vallipuram* [1934] M.L.J. 298.

(2) *Ahna Moona Muthuraman Chettiar* v. *K.M. Nair & Ors.* [1938] M.L.J. 177.

(3) *Woodham Smith* v. *Edwards* [1908] 2 K.B. 899.

APPLICATION.

Ng Kong Yeam for the plaintiff/respondent.

L. M. Ong for the first defendant/applicant.

Syed Othman J.: There was a settlement between the parties in an action relating to the application now before me. For the purpose of the present application the relevant portion of the judgment reads as follows:

"... By consent this court doth order that judgment be and is hereby entered for the plaintiff against the defendants in this action in the sum of Dollars Twenty-five Thousand ($25,000) only and by consent this court doth further order that the defendants do pay to the plaintiff the said sum of $25,000 only by fifteen (15) equal monthly instalments, the first of such instalments to be paid on or before the 1st day of April, 1974 and the subsequent instalments thereof on or before the 1st day of each succeeding month until the whole of the aforesaid sum shall have been fully settled and in the event of the defendants failing to pay any one monthly instalment in the manner as hereinbefore ordered, the whole of the balance then remaining unpaid shall immediately become due and payable."

On the 1st April, 1974, the defendants did not pay the first instalment. By a letter dated 28th April, 1974 the solicitors for the plaintiff, demanded defendants to pay the instalment and stated that unless the sum was paid the whole of the judgment sum of $25,000 would become payable. On 22nd June, 1974 the defendants paid $1666.66. By a letter dated 19th May, 1974 the plaintiff's solicitors demanded payment of $3,333.32 being instalments for May and June, 1974. According to the first defendant she could not pay because she could not get the second defendant to give her any money. As no payment was made, on 11th June, 1974 the plaintiff caused a writ of seizure and sale to be issued and all movable properties at defendants' place of business and those in first defendant's house were seized.

The first defendant in her application says that that the seizure was wrongful or irregular and seeks to set it aside. In argument Mr. Ong, for the first defendant, says in effect that the seizure and sale is bad as the order of the court for payment by instalments should operate as a bar to other forms of execution. He relies on order 47 rule 17(a) of the Rules of the Supreme Court and two cases cited below. The relevant portion of order 47 rule 17(a) reads:

"Every person to whom any sum of money ... are payable under a judgment ... shall, as soon as the money are ... payable, be entitled to sue out one or more writ or writs of seizure and sale to enforce payment thereof, subject nevertheless as follows:

(a) if the judgment or order is for payment within a period therein mentioned, no such writ as aforesaid shall be issued until after the expiration of such period."

In *G. Stephen* v. *Vallipuram*[1] Howes J. said:

"So long as the order for payment by instalments exists, I hold that the judgment-creditor cannot proceed to execution. There was no provision in the judge's order as to what was to be done in the event of the judgment-debtor making default. The remedy was therefore in default, for the judgment-creditor to apply to have the order as to payment by instalments rescinded. This he did not do until after the order to attachment had been issued."

In *Ahna Moona Muthuraman Chettiar* v. *K. M. Nair and Others*,[2] a Singapore case, the head-notes read:

"An order made under section 665 of the Civil Procedure Code, 1907 corresponding to R.S.C. O. 40 r. 30(3) for payment of the judgment debt by monthly instalments operates as a bar to any other process of execution in respect of the unpaid balance of the judgment debt, and while such an order is in operation and the payments thereunder are being made, a judgment creditor is not entitled to issue a writ of seizure and sale."

Although this is a Singapore case, under the old Straits Settlements Civil Procedure Code, the principle can be said to be the same here as was in Singapore.